Supreme Court, U.S.
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No. 96-1477

In The

Supreme Court of the United States

October Term, 1996

ROBERT W. TATREAU,

Petitioner,

vs.

ROBERT A. LEACH, Executive Director of the Minnesota Board of Medical Practice,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the imposition of discipline upon Petitioner's medical license on the basis of a reciprocal statute which allows Minnesota to discipline a physician based on another state's disciplinary action violate Petitioner's procedural due process rights?

II. Did the exclusion of testimony and evidence relating to mitigation belatedly offered after the close of the hearing record violate Petitioner's procedural due process rights?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. THE DECISION OF THE MINNESOTA COURT OF APPEALS THAT DUE PROCESS DOES NOT PRECLUDE A STATE REGULATORY BOARD FROM IMPOSING DISCIPLINE BASED ON THE FACT THAT THE PROFESSIONAL WAS DISCIPLINED IN ANOTHER STATE DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT 5

II. THERE IS NO ISSUE CONCERNING MITIGATING EVIDENCE THAT WARRANTS REVIEW .. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

FEDERAL DECISIONS

Green v. United States, 365 U.S. 301 (1961) 10

Groppi v. Leslie, 404 U.S. 496 (1972) 10, 11

In re Ruffalo, 390 U.S. 544 (1968) 7, 8

In re Thies, 662 F.2d 771 (D.C. Cir. 1980) 8, 9

Selling v. Radford, 243 U.S. 46 (1917) 7, 8

Theard v. United States, 354 U.S. 278 (1957) 8

MINNESOTA DECISIONS

Padilla v. Minnesota State Bd. of Medical Examiners, 382 N.W.2d 876 (Minn. Ct. App. 1986) 10

DECISIONS OF OTHER JURISDICTIONS

Butts v. Wyoming State Bd. of Architects, 911 P.2d 1062 (Wyo. 1996) 5, 6, 11

Halyalkar v. Board of Regents, 527 N.E.2d 1222 (N.Y. 1988) 7

Johnston v. State Board of Medical Education and Licensure, 410 A.2d 103 (Pa. Commw. Ct. 1980) 6

Marek v. Board of Podiatric Medicine, 20 Cal. Rptr. 2d 474 (Cal. Dist. Ct. App. 1993) 5, 6, 11

Soenhair v. Department of State, Bureau of Professional and Occupational Affairs, 459 A.2d 877 (Pa. Commw. Ct. 1983) 6

STATUTES

Minn. Stat. Chapter 14 (1996) 2

Minn. Stat. § 14.60 (1996) 3, 12

TABLE OF AUTHORITIES – Continued

Page

Minn. Stat. § 14.62 (1996) 2

Minn. Stat. § 147.091, subd. 1(d) (1996) 2, 3, 4, 5, 7

Minn. Stat. § 214.103, subds. 5, 6 and 7 (1996) 2

Cal. Bus. & Prof. § 2305 6

RULES AND REGULATIONS

Minn. R. 1400.6600 (1996) 3

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision of the Minnesota Court of Appeals in this case. That opinion (Pet. App. A-2 - A-9) is not reported.

STATEMENT OF THE CASE

Petitioner has been licensed by the Minnesota Board of Medical Practice since 1974. Pet. App. A-16. Concurrent with his Minnesota licensure, Petitioner has also held medical licenses in the states of California and Colorado. *Id.*

On June 24, 1986, January 9, 1987, and April 26, 1988, the Board of Podiatric Medicine, Medical Board of California, Department of Consumer Affairs ("the California Board") filed accusations against Petitioner, charging him with unprofessional conduct based on acts of gross negligence and incompetence in the performance of his duties as a physician. *Id.* These accusations were resolved in March 1989 when Petitioner entered into a "Stipulation in Settlement" with the California Board which required him to surrender his license and to waive any right to renewal or reinstatement of the license except by board order. Pet. App. A-17.

On January 18, 1989, the Colorado State Board of Medical Examiners entered into a "Stipulation and Order" with Petitioner which required him to surrender his medical license based on fraud, misrepresentation, or

deception in obtaining his Colorado medical license. Pet. App. A-16.

On January 31, 1990, the Minnesota Board, acting through its Complaint Review Committee, ("Committee")[1] held a disciplinary conference with Petitioner to discuss the actions taken by the California and Colorado boards. Pet. App. A-18. The Committee determined that Petitioner had been disciplined by the California and Colorado medical boards and that those actions were grounds for disciplinary action in Minnesota pursuant to Minn. Stat. § 147.091, subd. 1(d).[2]

After a lengthy period of unsuccessful settlement negotiations, an administrative proceeding was initiated pursuant to Minn. Stat. Chapter 14, the Administrative Procedure Act.[3] Pet. App. A-4. Significantly, the Committee did not plead its case under the statutory provisions

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[1] A committee made up of Board members acts on behalf of the Board in prosecuting complaints. The Committee members act independently of the full board and do not participate in Board decisions in the matter. Minn. Stat. § 214.103, subds. 5, 6 and 7 (1996).

[2] Minn. Stat. § 147.091, subd. 1(d) provides as follows:

> . . . The following conduct is prohibited and is grounds for disciplinary action:
>
> . . . .
>
> (d) Revocation, suspension, restriction, limitation, or other disciplinary action against the person's medical license in another state or jurisdiction . . .

[3] Under Minnesota's APA, an administrative law judge conducts the hearing and makes a recommendation of facts and conclusions to the agency decision maker, here the Board of Medical Practice. Minn. Stat. § 14.62 (1996). The board, as decision maker, considers argument but does not take

which authorize disciplinary action based on unprofessional or unethical conduct, although these categorizations of Petitioner's conduct are certainly descriptive of the conduct underlying the California and Colorado disciplinary violations. Instead, the Committee pled its case under Minn. Stat. § 147.091, subd. 1(d), which predicates disciplinary action upon the fact of discipline having been taken by another state or jurisdiction. *Id.* During the course of this litigation, the Committee sought summary disposition based on the undisputed fact that discipline had been imposed against Petitioner's license in another jurisdiction.[4] *Id.* Petitioner was sent a Notice of Motion and Motion For Summary Disposition on January 12, 1996. Petitioner submitted a responsive Memorandum on February 5, 1996. Pet. App. A-30.

At the February 9, 1996 motion hearing, Petitioner's argument did not include a request to present mitigating evidence, although Petitioner did include such evidence by means of affidavit. Pet. App. A-47. Instead, Petitioner argued that he was entitled to a hearing on the underlying conduct which formed the basis of the California and Colorado disciplinary actions. Pet. App. A-30.

On March 6, 1996, the administrative law judge issued his report which included a recommendation that the Committee's motion for summary disposition be granted. Pet. App. A-14. On May 11, 1996, a hearing was

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additional evidence into the record before rendering the final agency decision. Minn. Stat. § 14.60 (1996).

[4] Summary disposition under Minnesota's APA is the administrative equivalent to summary judgment and the same standards apply. Minn. R. 1400.6600 (1996).

held before the full Board of Medical Practice. Pet. App. A-10. Petitioner, through counsel, was allowed to argue his case at this hearing. Because the administrative hearing record had been closed, however, Petitioner was not allowed to present extra-record documentation and affidavits to the Board.

Like both the California and Colorado boards, the Minnesota Board also decided to impose discipline against Petitioner's license to practice medicine. The Minnesota Board based its action on the fact of discipline having been taken by other states, pursuant to Minn. Stat. § 147.091, subd. 1(d). Pet. App. A-10. Although both California and Colorado imposed the ultimate sanction against Petitioner depriving him of his license to practice medicine in those states, the Minnesota Board issued a disciplinary order which merely reprimanded Petitioner and required that he secure Board authorization and a pre-approved practice setting before commencing practice in the areas of obstetrics and gynecology. *Id.*

REASONS FOR DENYING THE PETITION

A writ of certiorari should not issue because Petitioner has failed to show that the Minnesota Court of Appeals' decision conflicts with the decision of any other court or that it involves an important federal question. Consequently, this case does not warrant review by this Court.

I. THE DECISION OF THE MINNESOTA COURT OF APPEALS THAT DUE PROCESS DOES NOT PRECLUDE A STATE REGULATORY BOARD FROM IMPOSING DISCIPLINE BASED ON THE FACT THAT THE PROFESSIONAL WAS DISCIPLINED IN ANOTHER STATE DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

In this case, the Minnesota Court of Appeals upheld the imposition of discipline against a regulated professional following adverse action taken by another state. The subsequent disciplinary action was taken on the basis of a reciprocal statute which allowed disciplinary action to be based on the fact of discipline having been imposed by another state or jurisdiction. The operative Minnesota statute provides:

> The following conduct is prohibited and is grounds for disciplinary action:
>
> . . . .
>
> (d) Revocation, suspension, restriction, limitation, or other disciplinary action against the person's medical license in another state or jurisdiction. . . .

Other courts facing similar due process challenges to disciplinary actions based on reciprocal statutes have, like the Minnesota Court of Appeals, rejected the challenges.

Two of the cases cited by Petitioner, *Marek v. Board of Podiatric Medicine*, 20 Cal. Rptr. 2d 474 (Cal. Dist. Ct. App. 1993), and *Butts v. Wyoming State Bd. of Architects*, 911 P.2d 1062 (Wyo. 1996), demonstrate the harmony among the lower courts which have looked at this issue. The

imposition of discipline in *Butts* and *Marek* was premised on the same type of reciprocal statute at issue in this case.[5] Both cases rejected the notion that a regulatory agency must investigate and prove the underlying basis for another state's disciplinary action prior to taking its own disciplinary action pursuant to a reciprocal statute. Two Pennsylvania decisions not cited by Petitioner have also reached the same due process conclusion when disciplinary action has been premised on a reciprocal statute. *See Johnston v. State Board of Medical Education and Licensure*, 410 A.2d 103 (Pa. Commw. Ct. 1980); *Soenhair v. Department of State, Bureau of Professional and Occupational Affairs*, 459 A.2d 877 (Pa. Commw. Ct. 1983).

The cases cited by Petitioner which reach a different result do so not because due process prohibits discipline

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[5] The Wyoming statute at issue in *Butts* provides:

> (a) The board may take disciplinary actions, singularly or in combination, against a licensee upon a finding of:
>
> . . . .
>
> (vii) Suspension or revocation of licensure by another state;. . . .

The California statute at issue in *Marek* provides:

> **Cal. Bus. & Prof. § 2305. Suspension or revocation by another state or federal government**
>
> The revocation, suspension, or other discipline by another state of a license or certificate to practice medicine issued by the state, or the revocation, suspension, or restriction of the authority to practice medicine by any agency of the federal government, to a licensee under this chapter shall constitute grounds for disciplinary action for unprofessional conduct against such licensee in this state.

based on a reciprocal statute, but because a different issue is involved – applying collateral estoppel principles to affirmatively prove incidents of misconduct. In *Halyalkar v. Board of Regents*, 527 N.E.2d 1222 (N.Y. 1988), the regulatory board did not proceed under a statute such as Minn. Stat. § 147.091, subd. 1(d) which provides that another state's disciplinary action is a basis for discipline. Instead, the board attempted to prove actual misconduct – knowing and willful misconduct – through the summary mechanism of producing another state's disciplinary order, notwithstanding a subsequent finding by that other state's hearing examiner that Halyalkar was not guilty of any knowing or willful misconduct. In sum, the *Halyalkar* case involved the offensive use of collateral estoppel to prove specific incidents of misconduct. As such, the *Halyalkar* case is not in conflict with the present matter, which neither depends upon collateral estoppel principles nor was pled so as to require proof of the specific misconduct occurring in other states.

Petitioner also cites *Selling v. Radford*, 243 U.S. 46 (1917), and *In re Ruffalo*, 390 U.S. 544 (1968), asserting that these federal disbarment cases demonstrate a conflict with the present case. However, it is the substantive law which dictates the result in these cases, not conflicting due process principles.

The juxtaposition of state and federal disbarment proceedings is the premise for the *Selling* and *Ruffalo* cases. This context is critical because it is the attempt to summarily impose a state court disbarment result upon a federal court disbarment action which leads to the due process result in each case. As established in *Selling* and relied upon subsequently, this Court reserves for itself

decisions regarding "fitness to practice" for purposes of the federal bar. While state court actions bearing on the issue are entitled to respect, they are not conclusively binding on federal courts. *See Theard v. United States*, 354 U.S. 278, 281-82 (1957). Since Petitioner's case involves the use of one state regulatory agency's result by another state and is grounded in the substantive state law applicable to physician disciplinary matters, the *Selling* and *Ruffalo* decisions are inapplicable. These cases reflect the disciplinary standard that the federal courts have adopted, which does not impose discipline on a reciprocal basis. Neither case holds that due process precludes use of a reciprocal discipline standard if a state chooses to do so.

Likewise, *In re Thies*, 662 F.2d 771 (D.C. Cir. 1980), involves federal disbarment principles not at issue in this case and therefore presents no conflict with the decision below. *Thies* rejects a conclusive finding of "unfitness to practice" based solely on a felony conviction, when the conduct underlying that conviction may or may not bear on the fitness to practice issue – a premise distinct from the due process issue raised in this case.[6]

Thies is significant to this case, however, in that it illustrates that due process does permit both the approach used in the federal disbarment cases and the approach used by states that employ reciprocal discipline

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[6] In a footnote to the *Thies* decision, the court notes that the sentencing judge characterized the conduct underlying Thies' conviction as a "kindergarten shouting and pushing match," and concluded that "a five hundred dollar fine would be sufficient punishment. . . . " *In re Thies*, 662 F.2d at 772, n.5.

standards. Thies was a New York attorney who was disbarred without a hearing following his felony conviction for assaulting a federal officer. While the *Thies* decision is focused on the subsequent disciplinary action taken by the Federal Tax Court, it is the state's disbarment procedure which is analogous to the disciplinary action taken by the Minnesota Board. This state proceeding is referenced with approval in a footnote in the decision.

The state disbarment proceeding was accomplished without a hearing and was based on the sole ground that the New York Judiciary Law mandated automatic disbarment upon any felony conviction. *In re Thies*, 662 F.2d. at 772. In a footnote, the court comments on the procedures used in the state disciplinary proceeding, stating that these procedures "may well be adequate" for enforcing the New York Judiciary Law. Despite this acknowledgement of the adequacy of the New York procedures under its substantive reciprocal discipline scheme, the court concluded that under the different substantive rule regarding federal disbarments, before a federal court gives conclusive effect to a state court's finding of "unfitness to practice," due process guarantees have to be in place. *Id.* at 773 n.15. The court ruled that because federal court disbarment is considered "quasi-criminal" in nature, a heightened due process standard applied that imposed more stringent procedural requirements than were necessary under New York's reciprocal law.

Not only has Petitioner failed to find cases in genuine conflict with the present matter, but despite his claim of confusion in the courts Petitioner has only cited a handful of cases spanning almost 20 years which deal with the issue at all. Obviously, courts are not confused about the

due process principles applicable to regulatory action based on the type of reciprocal statute at issue in this case.

II. THERE IS NO ISSUE CONCERNING MITIGATING EVIDENCE THAT WARRANTS REVIEW.

Petitioner argues that he was denied a due process right to present all of the mitigating evidence he believed relevant to his case, and that this denial is in conflict with decisions from this Court. However, Petitioner's cited authority does not support the proposition that there is a due process right to present mitigating evidence in administrative disciplinary proceedings.

Petitioner relies upon *Green v. United States*, 365 U.S. 301 (1961), and *Groppi v. Leslie*, 404 U.S. 496 (1972), to support his due process argument concerning mitigating evidence. *Green* is a criminal case which asserts the proposition that prior to a court's imposition of punishment, a defendant should be allowed to speak in his own behalf. Of course, Petitioner's matter is not criminal in nature and the rules that apply to an administrative imposition of discipline by a regulatory agency differ from those which must be observed in a criminal matter. As the Minnesota Court of Appeals has established, disciplinary action imposed upon a health professional in Minnesota does not constitute "punishment" but is remedial action. *Padilla v. Minnesota State Bd. of Medical Examiners*, 382 N.W.2d 876, 887 (Minn. Ct. App. 1986).

Likewise, *Groppi* involves the imposition of punishment – imprisonment on the basis of a legislative contempt finding – upon an exercise of summary contempt

authority, without allowing the accused notice or opportunity to answer. Again, because of the punishment aspect of the case and further because unlike *Groppi*, this Petitioner was allowed notice and opportunity to be heard, *Groppi* is inapplicable to the present matter and does not demonstrate a conflict in authority.

Similarly, neither of the lower court decisions cited by Petitioner hold, or even suggest, that there is a due process right to introduce mitigating evidence in an administrative disciplinary proceeding. Both decisions cited by Petitioner merely mention the fact that mitigating evidence was presented by the professional, but do not state a due process issue with respect to that mitigating evidence. *See Marek v. Board of Podiatric Medicine*, 20 Cal. Rptr. 2d 474 (Cal. Dist. Ct. App. 1993) and *Butts v. Wyoming State Bd. of Architects*, 911 P.2d 1062 (Wyo. 1996).

Like the professionals in *Marek* and *Butts*, Petitioner was allowed to present mitigating evidence to the decision maker. Consequently, this matter does not state a due process issue based on a complete deprivation of the opportunity to present mitigating evidence. Instead, Petitioner's complaint is that he was not allowed to belatedly bolster the amount of mitigating evidence in the record.

Petitioner's opportunity to present mitigating evidence was at the administrative hearing on the Committee's Motion for Summary Disposition. This Motion hearing was appropriately noticed and Petitioner defended against it by submitting a legal memorandum and affidavit and by providing oral argument. What Petitioner was not allowed to do, however, was to supplement the hearing record with affidavits and testimony

offered after the administrative law judge had closed the hearing record. This evidentiary ruling is consistent with Minnesota APA requirements.[7] Petitioner cannot establish a conflict by the facts presented in this case. Petitioner can only assert a result he finds disappointing.

CONCLUSION

For the reasons provided above, Petitioner cannot demonstrate the direct and apparent conflict necessary to support a grant of certiorari. Accordingly, Respondent respectfully requests that the petition be denied.

Dated: April 15, 1997

Respectfully submitted,

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[7] Minn. Stat. § 14.60 provides that no factual information or evidence shall be considered in the determination of the case unless it is part of the record in the contested case proceeding.